

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

PHILLIP W. ARCE and PAJA, INC.,
d/b/a Arce Consultants, Plaintiffs

v.

No. 4:94CV169-S-O

COTTON CLUB OF GREENVILLE, INC.,
Defendant

O R D E R

The court has today, pursuant to its order dated May 18, 1995, conducted an in camera examination of the file maintained by the Mississippi Gaming Commission (MGC) on plaintiff Philip Arce. MGC is not a party to this action. The examination was conducted for the purpose of resolving the issues raised by MGC's Motion to Quash and Dismiss a subpoena duces tecum served upon it at the instance of defendant pursuant to Rule 45(b), Federal Rules of Civil Procedure. Defendant, a Greenville casino licensed by MGC, contends that the contents of MGC's file on Arce, one of the plaintiffs in this action, are relevant and that discovery is necessary to the preparation of its defense against plaintiffs' claims of breach of contract and defamation. Prior to the granting of defendant's casino license by MGC, plaintiff Arce was employed by defendant as its chief executive officer, but that relationship was terminated prior to the licensure of defendant. Plaintiffs' claims in this action arise out of that termination.

MGC's Motion to Quash and Dismiss is based on the provisions of §75-76-19, Miss. Code (1972), which provides, inter alia, that certain information and data collected and maintained by MGC

"... are confidential and may be revealed in whole or in part only in the course of the necessary administration

of this chapter or upon the lawful order of a court of competent jurisdiction Id., §75-76-19(3)(d).¹

MGC interposes no objection to producing certain contents of the file consisting of public records, records submitted by plaintiff Arce to MGC, and two internal memoranda which communicate the recommendation of MGC's Division of Investigations regarding action proposed to be taken as a result of MGC's investigation of plaintiff as the potential chief executive officer of defendant's casino. The only condition attached by MGC to the release of the

¹Under the provisions of §75-76-153, Miss. Code (1972),

"[a]n application to a court for an order requiring the commission or the executive director to release any information declared by law to be confidential shall be made only upon a motion in writing on ten (10) days' written notice to the commission or the executive director, the Attorney General and all persons who may be affected by the entry of such order. Copies of the motion and all papers filed in support of it shall be served with the notice by delivering a copy in person or by certified mail to the last known address of the person to be served."

Pursuant to that statute defendant earlier served its Motion for Release of Mississippi Gaming Commission Records by which it sought production of the MGC file now at issue. As a preliminary matter, in response to the objection of MGC, the court held by order dated April 26, 1995 that, notwithstanding the provisions of §75-76-153, procedure in the federal courts is governed by the Federal Rules of Civil Procedure; that under the Rules discovery from non-parties can be obtained only by way of a Rule 45 subpoena; and that the mere service of a motion without the issuance of some form of process to subject MGC to the personal jurisdiction of the court was not effective to bring MGC before the court. Defendant was therefore directed to serve a subpoena upon MGC as provided in Rule 45. It is the service of that subpoena which led to the present motion. Defendant's motion for release is still pending, and, of course, to the extent MGC's motion to quash is well taken, defendant's motion for release is not, and vice versa. There is no contention that the notice requirements of §75-76-153 have not been met, and the court holds that the procedure employed here is sufficient to comply with those requirements. See, Laxalt v. McClatchy, 109 F.R.D. 632, 635 (D Nev. 1986).

records submitted to it by Arce is that there must be either a waiver of Arce's confidentiality interests in the document, signed by him, or an order of the court requiring production of the documents. As to the remaining contents of its file, MGC contends that these papers constitute highly sensitive work product which identifies numerous confidential sources of information utilized by MGC in carrying out its investigatory responsibilities under Mississippi's Gaming Control Act; that disclosure of that class of documents would cause such confidential sources to no longer be available to MGC and thus would hamper it in carrying out its responsibilities under the Gaming Control Act.

MGC suggested, as an alternative, in its motion to quash that the court conduct an in camera examination of the file in question and that there should be present during the in camera examination the MGC inspector familiar with MGC's investigation of Arce to assist the court by explaining the content and significance of file documents. It also suggested that counsel for MGC be present, as well as counsel for the parties to this action, but excluding the parties themselves. The court adopted that suggestion, as well as the further suggestion that note taking be prohibited during the in camera proceedings and that disclosure of information contained in materials not ordered by the court to be produced for use in this action be prohibited. Those provisions are set out in the court's order of May 18, 1995.

During today's examination most of the contents of the file were viewed by counsel for the parties, as well as the court.

However, certain highly sensitive material was seen only by the court, MGC's investigator, and counsel for MGC. In the course of its examination of the file the court has concluded that MGC's motion to quash and defendant's corresponding motion for release of gaming commission records should be sustained in part and denied in part.

In making its determinations the court is called upon to construe and apply the confidentiality provisions of §75-76-19. This particular section of Mississippi's 1990 Gaming Control Act has never been construed in a reported decision of any court, and the court is informed by counsel for MGC that this case presents the first occasion for any court to apply §75-76-19. Often such a ground breaking task is rather difficult, but here the parties suggest in their memoranda, as well as during the in camera proceedings, that since the Mississippi Gaming Control Act is patterned after Nevada's act which contains a confidentiality provision identical with that of §75-76-19, Nevada decisions furnish helpful guidance. The court agrees. The parties have cited two decisions of the United States District Court for the District of Nevada construing and applying the identical statutory language in a context very similar to the present one. Laxalt v. McClatchy, 109 F.R.D. 632 (D Nev. 1986) (Laxalt I); Laxalt v. McClatchy, 116 F.R.D. 455 (D Nev. 1986) (Laxalt II). In Laxalt I the court held

"[w]here a court of competent jurisdiction is authorized to order discovery of confidential records, the court must balance the public interest in avoiding harm from disclosure against the benefits of providing relevant evidence in civil litigation In a libel action, where the records may go to the heart of material factual issues, the benefits usually outweigh the confidentiality interests" 109 F.R.D., at 635.

In Laxalt II the court adopted a four part test to be utilized in the balancing process.

"Initially, the relevance of the evidence must be taken into account. Further, the availability of other evidence and the government's role in the litigation must be considered. Finally, ... the extent to which disclosure would hinder frank and independent discussion regarding the agency's contemplated decisions and policies would factor into the court's decision." 116 F.R.D., at 459.

Applying the foregoing principles, the court has determined that a total of 19 items or groups of items from MGC's file should be produced. These items are all relevant, and their disclosure will not hinder MGC in the performance of its duties. Although some of the information contained in the documents should be available from the parties themselves, there is no readily available source of other information, and the production of these items makes it unnecessary for the court to require production of other items containing the same or similar information but also containing highly sensitive information which would likely, if disclosed, have repercussions upon MGC's ability to effectively carry out its investigatory responsibilities. Even though neither MGC nor any other agency of the State of Mississippi is a party to this litigation, and the state therefore has no direct interest in

it, that does not preclude the discovery because it will not adversely impact important governmental functions. Furthermore, as the court noted in Laxalt I, the benefits of factual disclosure in a defamation case will usually outweigh confidentiality interests.

Plaintiff Arce also asserts a confidentiality interest in the contents of his file, but his interest under §75-76-19 is no greater than that of MGC, and the court finds that Arce will not be unfairly disadvantaged by the production of the 19 items which the court holds to be discoverable. In addition, as between Arce and defendant, Arce has waived his confidentiality interest in any information disclosed to Dan McDaniel, the attorney jointly representing Arce and defendant in the licensure application proceedings, as well as information disclosed to others in the presence of McDaniel while the joint representation continued. Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 173 (5 Cir. 1979); Garner v. Wolfinbarger, 430 F.2d 1093, 1103 (5 Cir. 1970). Arce also contends that disclosure of only part of the file may be unfair to him because the disclosed items may paint a distorted picture not representative of the entire file. Partial disclosure can certainly have that result. However, in this case the court has carefully examined the entire file, and based on that examination it finds that the items required to be produced by MGC contain information both arguably favorable and arguably unfavorable to Arce in a proportion which is fairly representative of the

entire file, and in a proportion which, in any event, is not prejudicial to Arce.

Nevertheless, "usually" does not mean "always." See, Laxalt I, at 635. In the opinion of this court confidentiality interests sometimes do outweigh the benefits of disclosure, particularly where the same or like information is available from a less sensitive source and the confidential information is only marginally relevant. It is not only MGC, but persons and organizations supplying it with confidential and sometimes highly sensitive -- indeed, even dangerous -- information, who have an interest in the confidentiality of MGC's files. If it becomes known to such persons and/or organizations that their legitimate expectations of confidentiality will not be respected, then they are not as likely to be available to MGC as sources of vital information, and the important governmental objectives of an honest and competitive gaming industry free from criminal and corruptive elements, see, §75-76-3(3)(a), Miss. Code (1972), will be compromised. Thus, the court must be careful in applying §75-76-19 to allow discovery of what is necessary to the ends of justice in this case while respecting legitimate expectations of confidentiality in material which perhaps might be useful in some marginal way, but is not essential and would, if disclosed, seriously undermine the legitimate confidentiality interests of MGC and its informants.

The court will not undertake to elaborate in detail upon its decision to deny discovery of certain of the items found in MGC's

file. To do so would in many instances be functionally equivalent to making them public. It is sufficient for present purposes to say that the application of the balancing test to those items causes the scale to tip against disclosure for one or more of the following reasons. The relevant information found in those documents is also available either from the parties, from published sources, or in other, less sensitive, items contained in the MGC file which are being ordered to be produced. Certain information contained in some of the items is relevant, but only marginally so, and the marginal relevance is outweighed by the highly sensitive and confidential nature of other information contained in the documents. Certain other items, whether sensitive or not, are simply not relevant in this litigation. Production is being denied as to all such items.

In addition, the court is of the opinion that access to the items from MGC's file required to be disclosed should be restricted as hereinafter provided.

In order to preserve a record for any subsequent review either in this court or in the appellate courts, MGC will be required to prepare a copy of its entire file maintained on plaintiff Phillip Arce, including any audio tape recordings, which shall be filed under seal with the clerk of this court. Access to the sealed file shall be available only to, or upon order of, a judicial officer of the United States having jurisdiction of this action. The sealed envelope in which the copy of the MGC file is to be maintained

shall be appropriately labeled as hereinafter specified. Before authorizing the unsealing of the file by any person other than a judicial officer of the United States, the court will give notice to MGC as hereinafter provided, so that MGC may have the opportunity to present to the court any arguments it may have for withholding some or all of the contents of the file from the proposed examination, as well as any suggestions as to the necessity for redaction of certain information. It is, therefore

ORDERED:

1. That within 11 days of this date MGC shall produce to plaintiffs and defendant in this action copies of the following items from its file maintained on plaintiff Phillip Arce.

- a. Personal Investigation Checklist.
- b. Fourteen page fax of two complaints and two judgments in the District Court of Clark County, Nevada.
- c. January 25, 1994 memorandum from McGee to Patton.
- d. January 21, 1994 memorandum from North to McGee.
- e. January 21, 1994 memorandum from North to McGee (Phillip Arce request).
- f. Proposed letter to Phillip Arce from Harvey dated January 21, 1994.
- g. December 14, 1993 letter from Phillip Arce to Harvey.

h. January 13, 1994 letter from Walker to Livingston.

i. The contents of the document entitled "Investigative Report" beginning with the green tab numbered "1" to the end of the document.

j. Equifax Special Records Search Report.

k. The papers comprising a collection of documents marked with green tab "2" from the green tab to the end of the collection of documents.

l. Response to questionnaire from Robert E. Kelly dated October 30, 1993.

m. Response to questionnaire from Herb McDonald dated October 26, 1993.

n. Response to questionnaire from Burton M. Cohn dated October 26, 1993.

o. Response to questionnaire from Harvey Wald dated November 6, 1993.

p. Response to questionnaire from James Michael Kelly dated October 28, 1993.

q. 1993 Los Angeles County tax bill (Mazal).

r. MGC memorandum dated October 21, 1993 to Mississippi Highway Patrol, and response.

s. Audio cassette tape recording of MGC interview of Phillip Arce with Dan McDaniel present, November 15, 1993.

2. That access to the items hereinabove required to be produced and information derived solely therefrom be, and it is hereby, restricted to trial counsel in this case and the members of their respective staffs actually assisting counsel in trial and preparation for trial. No copy of any item herein required to be disclosed, nor any information derived solely therefrom, nor any summary or description of any such item shall be made available to any other person except as may be the unavoidable result of the use of such items during depositions taken in this case and hearings, trial or other proceedings herein. Counsel shall obtain from each staff member assisting them in this case a written declaration that the staff member has read this order and that he or she understands its provisions and the consequences of violation of this paragraph.

3. MGC shall within 11 days of this date prepare and file with the clerk of this court under seal a complete copy of the file which it maintains on plaintiff Phillip Arce, including all audio tape recordings therein contained, access to which shall be available only to, or upon order of, a judicial officer of the United States having jurisdiction of this action. There shall be prominently set out on the front and back of the sealed envelope in which the copy of the file is sealed the following notice.

"NOTICE: This envelope is sealed by order of Magistrate Judge J. David Orlansky dated June 21, 1995. This envelope may not be opened except by, or upon order of, a judicial officer of the United States having jurisdiction of this case. Before the contents of this envelope may be viewed or heard by any person other than a judicial officer of the United States the Mississippi

Gaming Commission must be given advance notice as provided in the court's order of June 21, 1995."

Before authorizing the unsealing of the file by any person other than a judicial officer of the United States, the court will give advance notice to MGC through its counsel, Honorable R. Stewart Smith, Jr., Special Assistant Attorney General, Gaming Control Section, Mississippi Gaming Commission, Post Office Box 23577, Jackson, Mississippi 39225, telephone (601)961-4400. MGC shall receive a minimum of five days advance notice of any such proposed unsealing unless the court determines that exigencies require a shorter notice, in which event the court's determination shall be communicated to MGC by the most expeditious practical means available.

4. Except as explicitly otherwise provided in this order MGC's Motion to Quash and Dismiss [5] is sustained, and defendant's Motion for Release of Mississippi Gaming Commission Records [29] is denied.

THIS, the 21st day of June, 1995.

UNITED STATES MAGISTRATE JUDGE